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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; DONALD TRUMP, in his official capacity as President of the United States; et al.,

Federal Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' STATUS REPORT AS OF MARCH 7, 2017 WITH A PROPOSED SCHEDULE

At the Rule 16 Conference on February 7, 2017, the Court and counsel for the Parties agreed to monthly status conferences, where the Court would be apprised on the status of discovery and counsel for the Parties would bring new matters to the Court's attention. Since the February 7 Rule 16 Conference, counsel for the Parties met and conferred on the following issues on March 1, 2017: Requests for Production Served on the United States; Requests for Admissions Served on Executive Office of the President and the EPA; Plaintiffs' January 24, 2017 Document Preservation Letter; Future Requests for Production (if any); and Future Fact Discovery. Counsel for Plaintiffs and Federal Defendants conferred again on March 7, 2017 regarding Requests for Production Served on the United States.

Plaintiffs hereby submit their Status Report on the various issues addressed at the February 7 conference, as well as on certain issues that have recently arisen.

1. Intervenor Defendants' Answer

By denying virtually all of the First Amended Complaint's allegations of fact based on alleged lack of sufficient information and knowledge, the answer filed by the Intervenor Defendants on December 15, 2016 did nothing to narrow disputed issues of fact. During the February 7 Status Conference, the Court raised concerns that denials by the Intervenor Defendants (based on insufficient information or belief) in their answer could impede Plaintiffs' ability to prove their claims, if the Intervenor Defendants were to challenge issues that the Federal Defendants admitted in their answer to the Amended Complaint. In their Status Report, counsel for the Intervenor Defendants stated they "will be conferring further with Plaintiffs' counsel regarding these issues and believe they can be resolved by agreement." At the February 7 Status Conference, counsel for the Intervenor Defendants refused to take a position, stating: "it really is beside the point whether the intervenors concede or contest the factual underpinnings of the plaintiffs' case." Counsel continually took the position that he "did not know" what position the Intervenor Defendants would take as to matters admitted by the Federal Defendants. The Court requested a response to the question: What legal standing do the Intervenor Defendants have to contest admissions that the United States makes in this litigation?

On February 15, 2017, counsel for Plaintiffs wrote counsel for the Intervenor Defendants about the deficiencies in the answer and attached a summary of the admissions made by Federal Defendants in their answer to Plaintiffs' First Amended Complaint.

The February 15 letter pointed out that the Intervenor Defendants claimed a "lack of sufficient knowledge to admit or deny": (1) factual allegations regarding the content of publicly available documents cited in the First Amended Complaint that can be accessed by a simple internet search; (2) factual allegations long known by, and previously admitted by, the Intervenor Defendants and/or their members as established by the Intervenor Defendants and/or their members' own documents and records; and (3) factual allegations that could be admitted with slight alterations in the averments, as the Federal Defendants did in their answer. The February 15 letter asserted "Intervenor Defendants failed to conduct a 'reasonable and competent inquiry' in the course of preparing their answer to the First Amended Complaint in violation of Rule 11." The February 15 letter was accompanied by a draft of legal and factual arguments and exhibits constituting evidence of the Intervenor Defendants' knowledge of the factual allegations in Plaintiffs' First Amended Complaint.

In prior meet and confers regarding discovery, and in a discussion with Mr. Volpe at the courthouse on February 7, counsel for Plaintiffs stated their belief that the answer of the Intervenor Defendants regarding insufficient knowledge or information to many of the factual allegations to be incorrect given the wealth of knowledge that the Intervenor Defendants have had for decades, including their own independent scientific research, on climate change.

Despite their promise to confer further with Plaintiffs' counsel regarding these issues and their plea of ignorance about climate matters, there has been **no** attempt by counsel for the Intervenor-Defendants to confer on this issue since the February 7 Status Conference. Plaintiffs have not received any substantive response to the February 15 letter, as well as Plaintiffs' repeated requests that the Intervenor Defendants substantively respond to the factual allegations and inform Plaintiffs' counsel if the Intervenor Defendants intend to dispute those facts, particularly those admitted by the Federal Defendants.

2. The Status of Pleadings

Pursuant to Fed. R. Civ. P. 7(A) and 15, all pleadings have been filed, and there has been Joinder of all Claims, Remedies, and Parties pursuant to Fed. R. Civ. P. 18 and 19.

3. The Scope of Discovery

Simplifying Discovery: Plaintiffs clearly received the message that the goal is to simplify this case from a case management perspective. As this Court stated at the February 7 Status Conference: "this case is mainly going to be guided by expert testimony in terms of the main issue." Plaintiffs have been working to whittle down the number of experts and believe there will be approximately 12 experts, depending on the factual issues that the Intervenor Defendants decide to dispute. On or before March 24, 2017, Plaintiffs will have commenced disclosure of their expert witnesses on a rolling basis and will have served focused document requests. Already, by the end of the day, March 7, 2017, Plaintiffs will have served two document requests on API, one document request on NAM, one document request on AFPM, two document requests on the United States, and one document request on the Executive Office of the President. Plaintiffs will continue to prepare and serve narrow document requests as expeditiously as possible.

Phased Discovery: Discovery will focus primarily on two aspects of the case: (a) Defendants' knowledge that key federal policies and decisions were made in knowing disregard of their climate consequences; and (b) the science. Plaintiffs do not believe that discovery should be conducted in phases or be limited to or focused on particular issues.

Informal Methods of Obtaining Information: In developing their discovery plan, Plaintiffs have been conducting informal discovery (in order to limit the scope of formal discovery) and had hoped to have ongoing access to data and information relevant to Plaintiffs' claims from the Federal Defendants that was publicly available on government websites. Unfortunately, as of January 20, 2017, numerous federal websites were altered and information was removed. In response, on January 24, 2017, counsel for Plaintiffs sent a document preservation and litigation hold letter to all Defendants. A copy of that January 24, 2017 letter is attached to Plaintiffs' January 31 Status Report. ECF 111 at Exh. 1.

Defendants have yet to provide any written response to the January 24, 2017 letter. Plaintiffs continue to request assurance that counsel for Defendants have taken the appropriate steps to insure that all potentially relevant information and data have been and are being preserved. Most recently, during the March 1 meet and confer, Plaintiffs requested copies of the document preservation and litigation hold letters that the General Counsels of Federal Defendants have issued to their respective Departments and agencies so that Plaintiffs can evaluate whether those letters meet the needs of preserving evidence potentially relevant to this litigation.

Plaintiffs request that this Court issue an order to address this crucial concern. The order would provide that, for federal web pages or websites providing, as of **January 19, 2017**, public access to ***climate change-related information***, where such information was created, maintained, or displayed by federal employees or federal contractors, either:

(A) The Federal Defendants shall maintain such web pages or websites, their functionality, and their information in the condition they existed on January 19, 2017 if, as of the date of the Order, such websites and information remain publicly available and operational;

(B) If, as of the date of the Order, such web pages or websites, their functionality, or their information have been altered or removed in any way, the Federal Defendants shall restore such websites, their functionality, and their information in the condition they existed on January 19, 2017; or

(C) On or before February 16, 2017, counsel for the Federal Defendants shall provide a true and correct copy of such webpages or websites, their functionality, and the information they contain or contained, to counsel for Plaintiffs.

(D) Nothing in the foregoing provisions, including use of the terms "maintain," "restore," or "provide," shall be taken to require any Federal Defendant to withhold updates to webpages or websites, their functionality, and the information. Instead, this Order provides that such new or additional information must be incorporated or otherwise updated on existing or restored web pages or websites.

Discovery as to Intervenor Defendants: The Intervenor Defendants take the position that they should not be subject to fact discovery. In their last Status Report, the Intervenor Defendants stated they "do not intend to propound fact discovery (document production request, interrogatories, requests for admission) to either the Plaintiffs or the Federal Defendants." The Intervenor Defendants indicated they would, however, engage in expert discovery. Plaintiffs believe the Intervenor Defendants should be subject to discovery as parties. That is the basis on which they intervened in this case: "Proposed Intervenor-Defendants should also be allowed to participate as full parties with no court-imposed limits on discovery, briefing page limits, or agreements not to address the same arguments as Defendants make." Reply in Support of Proposed Intervenor Defendants' Motion to Intervene, ECF 37 at 17. Because the Intervenor Defendants sought "to intervene in all phases of litigation asserting that once liability is established, the harm to their interests will be complete" (ECF 50 at 4), the Intervenor Defendants should be subject to fact discovery.

4. Requests for Admissions

Shortly after the Federal Defendants filed their answer on January 13, 2017, Plaintiffs propounded ten requests for admissions to Defendants EPA and Office of the President to clarify certain admissions and denials in the Federal Defendants' answer. These requests were served in an attempt to further narrow the scope of document production requests during discovery. Plaintiffs previously agreed to a 30-day extension. At the March 1 meet and confer, the Federal Defendants requested an additional extension of 60 days. Plaintiffs did not agree to such a long extension, given that counsel for the Federal Defendants have not used the initial 30-day extension to respond to the pending Requests, but rather to prepare a Motion for interlocutory appeal and stay pending appeal; Expedited consideration of the Motion for interlocutory appeal;

and Motion for a stay of all discovery during the pendency of the interlocutory appeal process and expedited hearing on that motion to stay.

5. Scheduling

Given the urgency of the climate crisis and in light of the well-publicized fact that the Federal Defendants are acting now to accelerate fossil fuel development, Plaintiffs are prepared to promptly complete discovery and will be ready for a court trial on November 6, 2017. The Federal Defendants seek to delay discovery and trial. For example, the Federal Defendants suggested that fact discovery should remain open until 2019, ***over two years*** after this Rule 16 Conference and ***almost four years*** after the Complaint was filed and served.

I. PROPOSED DATES FOR THE SCHEDULING ORDER

April 24, 2017	DISCOVERY MOTIONS ARE DUE TO BE FILED.
May 19, 2017	NON-EXPERT DISCOVERY IS TO BE COMPLETED.
May 26, 2017	EXPERT DISCLOSURES ARE DUE.
June 23, 2017	EXPERT DISCOVERY TO BE COMPLETED.
July 14, 2017	DISPOSITIVE MOTIONS ARE DUE TO BE FILED.

THE PRETRIAL ORDER IS DUE 45 DAYS AFTER DISPOSITIVE MOTIONS HAVE BEEN RULED ON OR BY **AUGUST 11, 2017** IF NO DISPOSITIVE MOTIONS ARE FILED.

THE JOINT ADR REPORT IS DUE 45 DAYS AFTER DISPOSITIVE MOTIONS HAVE BEEN RULED ON.

II. DISCOVERY PLAN

Initial disclosures: Plaintiffs do not believe that initial disclosures need to be exchanged.

Phased Discovery: Plaintiffs do not believe that discovery should be conducted in phases or be limited to or focused on particular issues.

Number of Depositions: Plaintiffs believe ten depositions per side would be insufficient to provide full discovery in this case. It is important that Plaintiffs have an opportunity to thoroughly develop a complete record through discovery and be able to identify the most knowledgeable witnesses. Not only will this allow Plaintiffs to present a case before the Court at trial as completely and efficiently as possible, it will narrow the issues.

To achieve these general goals, Plaintiffs believe the specifics of this case require 35 substantive fact depositions per side. Given the number of federal agency defendants and third parties who possess discoverable information, including companies doing business in the fossil fuel industry and consultants to the Federal Defendants and the Intervenor Defendants, Plaintiffs respectfully request this Court order that, absent good cause shown, and notwithstanding Federal Rule of Civil Procedure 30(a)(2)(A)(i), the parties may take up to, but no more than, 35 depositions per side (excluding experts). For the purpose of this request, a deposition of a party or non-party taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure shall count as one deposition, regardless of the number of witnesses presented to address the matters set forth in the notice. Additionally, depositions taken for the sole purpose of establishing the authenticity and admissibility of documents shall not count against the 35 deposition limit. Finally, Plaintiffs believe each Party should have an opportunity to take the deposition of any individual who appears on the other Party's Federal Rule of Civil Procedure 26(a)(3) pretrial disclosures, without regard to whether the allotted depositions have been exhausted, so long as the deposing party did not have reasonable notice that the person might be a trial witness and so long as the person was not previously deposed.

Number of Interrogatories/Requests for Production/Requests for Admission: Plaintiffs believe that each party should be allowed to propound the following discovery to each other party: 100 interrogatories, 100 document requests, and unlimited requests for admission.

Electronically Stored Information (ESI): Plaintiffs have complied with the requirements of LR 26-1 concerning ESI. Plaintiffs propose the parties agree and the Court enter a stipulation similar to the form attached to Plaintiffs' January 31 Status Report. ECF 111 at Exh. 2.

Scope of Discovery: Plaintiffs have been reviewing the answer filed by the Federal Defendants to determine the scope of admissions and what discovery needs to be conducted as to the matters remaining in dispute. Plaintiffs requested that the Federal Defendants meet and confer on February 6, 2017 to discuss the discovery and trial implications of the Federal Defendants' answer. To move the case forward, Plaintiffs served two of the Federal Defendants with requests for admissions. However, Plaintiffs understand the following matters have been admitted in the Federal Defendants' answer:

- That the use of fossil fuels is a major source of CO2 emissions, "placing our nation on an increasingly costly, insecure, and environmentally dangerous path." ¶ 150
- "[T]hat for over fifty years some officials and persons employed by the federal government have been aware of a growing body of scientific research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO2—including that increased concentrations of atmospheric CO2 could cause measurable long-lasting changes to the global climate, resulting in an array of severe deleterious effects to human beings, which will worsen over time." ¶ 1
- "[T]hat from 1850 to 2012, CO2 emissions from sources within the United States (including from land use) comprised more than 25 percent of cumulative global CO2 emissions." ¶ 151
- "Federal Defendants admit that they permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation. Federal Defendants admit that fossil fuel extraction, development, and consumption produce CO2 emissions and that past emissions of CO2 from such activities have increased the atmospheric concentration of CO2." ¶ 7

- That current CO2, methane and nitrous oxide levels are at "unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare." ¶ 5
- [C]urrent and projected concentrations of six well-mixed greenhouse gases in the atmosphere, including CO2, threaten the public health and welfare of current and future generations." ¶ 207
- "Federal Defendants admit that scientific evidence shows that elevated CO2 concentrations have caused ocean acidification and ocean warming" and "caused adverse effects to coral reefs and wildlife." ¶ 260
- "[S]tabilizing atmospheric CO2 concentrations will require deep reductions in CO2 emissions." ¶ 208
- "The United States has supported fossil fuel development through overseas public financing, primarily through the Export-Import Bank of the United States…" and that the Export-Import Bank "provided $14.8 billion in commitments for 78 transactions or projects in the petroleum sector, including...six in Russia/FSU...The Export-Import Bank of the United States also supported numerous coal and gas power plants." ¶ 177
- Federal Defendants admitted that the atmospheric CO_2 concentration
- exceeded 400 ppm in 2013 "for the first time in millions of years." ¶ 208
- Federal Defendants admitted that sea levels have been rising at a rate of 3.4 millimeters per year. ¶ 218.
- Federal Defendants admitted that fossil fuel production in the United States was 69.653 Quadrillion Btus in 2014. ¶ 155.

However, notwithstanding the Federal Defendants' admissions, to the extent the Intervenor Defendants will seek to dispute the admissions of the Federal Defendants, Plaintiffs will be required to present evidence establishing these admitted facts to ensure a full evidentiary record. Plaintiffs requested that the Intervenor Defendants concede the facts admitted by the Federal Defendants and have not received a response as of this filing.

Plaintiffs remain willing to meet with the Federal Defendants to narrow the scope of necessary discovery. In the absence of injunctive relief, under the Federal Defendants' 2-year discovery timeline, more global heating, climate disruption, and injuries to these young Plaintiffs and future generations will be irreversibly locked in. This Court said:

> We are not going to take five years to try this case. That's not going to happen. We are going to set a discovery deadline that's going to be reasonable and not extended far out into the future, and everyone needs to understand that.

ECF 100 at 11.

> The goal would be to set the discovery deadline and the motion practice, dispositive motions, *et cetera*, within a time period where a trial can be held by the middle or toward the fall of next year [2017].

ECF 100 at 12.

Respectfully submitted this 7th day of March, 2017,

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